Neutral Citation Number: [2024] EWHC 1115 (Admin)

Case No: AC-2023-LON-002013

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th May 2024

Before :

MR JUSTICE RITCHIE

- -

In the matter of an application for judicial review

Between :

THE KING **Claimant**

on the application of

ISAAC PARKER

- and -
SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Michael Bimmler of counsel (instructed by **Bhatia Best solicitors**) for the **Claimant**
Rosalind Earis of counsel (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 9th May 2024

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Approved Judgment

This judgment was handed down remotely at 14.30pm on Friday 10th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

Bundles

1. For the hearing I was provided with 3 lever arch files, two skeleton arguments and then a late bundle on the morning of the hearing, with a witness statement and a supplementary skeleton by the Defendant, about a new decision.

Summary in brief

2. The Claimant is in prison and has been there for 17 years. He is 67 years old. He is unmarried. He has not children. His parents have passed. He is estranged from his brother. He pleaded guilty to committing the crime of indecent assault on a woman in 2006, was sentenced to 4 years and in prison and made subject to an imprisonment for Public Protection Order in 2007. He had a string of previous convictions, 3 of which were for sexual offences. He wants to move to an open prison in preparation for release. The Parole Board (PB) have twice recently recommended he be transferred to an open prison. The first recent recommendation was made on 25th July 2022 for his transfer.

3. The Defendant has the power to decide whether the transfer to an open prison will occur and on 29th March 2023 (8 months delayed and in breach of his own 28 day timescale) rejected the Parole Board's recommendation, giving reasons.

4. The criteria at the time of the PB's and Defendant's decisions were: (1) low risk of absconding; (2) it was essential to transfer to inform the future decisions about release; and (3) transfer would not undermine public confidence in the system. The Defendant disagreed with the PB on (1) the risk, and (2) that transfer was essential.

5. This claim for Judicial Review (JR) was started on 29th June 2023, after Legal Aid was granted for it. Permission was granted for JR by Lavender J. on 1.12.2023. This was the hearing of the JR claim. The Grounds were that the Defendant's decision was unlawful/irrational on public law grounds because: (1) the Defendant irrationally misapplied the evidence when assessing the risk; and (2) the Defendant irrationally proposed a progressive closed prison regime to prepare/test the Claimant for future decisions on zero evidence instead of transfer to an open prison. The Claimant relied on his good conduct in prison, his positive engagement with all rehabilitation programmes, his learning about his maladapted thinking in the past, his lack of consumption of alcohol and the PB's reasoning and findings.

6. The Defendant submitted that: (1) the risk decision was evaluative and the Court was not permitted to quash it unless public law grounds were made out. (2) That by relying on two of the expert's reports on risk (Tuttle and Ormerod) the Defendant was entitled to make a different judgment call to the PB on risk. (3) The Claimant would be at risk of being overwhelmed and of defaulting to absconding, drinking and potentially offending, as he had in the past in 2006 (he committed the indecent assault on licence), 2016 (he absconded after transfer to an open prison) and 2020 (when he was released on licence and absconded). (4) Essentiality is an evaluative issue and the Defendant was entitled to reject the PB's evaluation and suggest progressive steps in a closed prison instead of transfer.

7. The hearing became irrelevant the afternoon before the hearing because the Defendant made a further decision. Following the normal course, the PB had re-evaluated the Claimant in January 2024 and again recommended transfer to an open prison. It took the Defendant 4 months (in breach of his own policy to decide in 28 days) to reject that recommendation and again refuse transfer to an open prison. Both parties agreed, as do I, that the lawfulness of the earlier decision was superseded by the later decision. Even if this Court were to find the challenged decision to have been unlawful and quashed it, that would have had no effect because of the later decision. Disappointingly, the Defendant has not published his 2024 decision yet or given reasons for it.

The submissions

8. The Defendant submits that the claim should be dismissed. It is academic. The Defendant offered to pay the Claimant's costs of the hearing. The Claimant submitted that the Court should adjourn the claim until after a Court of Appeal decision is handed down in two conjoined cases called *R (Oakley) v Secretary of State for Justice (No2)* [2024] EWHC 292 and *R (Sneddon) v Secretary of State for Justice* [2023] EWHC 3303 (Admin). It was submitted that the issues to be decided in those appeals will be determinative of the right approach in this claim. In addition, the Claimant proposed that once the new decision with reasons is provided by the Defendant, the Claimant could amend his grounds for JR and thereby avoid injustice by getting to a hearing quickly after *Oakley/Sneddon*.

Procedural unfairness

9. The injustice raised was as follows: the timescales for the circle involving the PB review and recommendation, the Defendant's decision, obtaining legal aid for JR, obtaining permission for JR and then getting a final hearing, are so long that final hearings are made meaningless by the next PB recommendation and subsequent decision of the Defendant. This case is the classic example. Because the Defendant took 8 months to decide on the PB's January 2022 decision and then obtaining Legal Aid and the Administrative Court permission process took so long, the final hearing was listed after the PB's next review date. I accept that this is a valid concern in these claims. Prisoners are being deprived of their right to JR ministerial decisions which affect their liberty by delays caused by taxpayer funded organisations and the time involved involved in getting permission and hearings through this Court.

Analysis

10. Prima facie, this claim has to be dismissed because it has become academic due to delay and being consigned to history by the efficiency of the PB process and the delayed first and second second decisions of the Defendant. Following the guidance in *R v Home Secretary ex p Salem* [1999] AC 450; and *L, M and P v Devon County Council* [2021] EWCA Civ. 358, this hearing will be academic because there is no longer any case to be decided which will directly affect the rights or obligations of the parties. Following *Macnaughton v Macnaughton's Trustees* [1953] SC 387, this Court has no concern with hypothetical, premature or academic questions, nor does it exist

to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau. This Court does retain a discretion to hear academic claims where there is good reason in the public interest for doing so, and I have carefully considered whether the procedural unfairness issue raised above would provide that reason. I do not consider that it does. The procedural unfairness can be considered in this judgment and taken into account in future decisions, on paper or on renewal, to expedite final hearings or to roll the permission decision into the final hearing. By that route the Administrative Court can prevent imprisoned Claimants from suffering the unfairness of supervening decisions.

11. Adjournment or stay of this claim, pending the Defendant's new decision and the Court of Appeal's judgment in *Oakley/Sneddon* is a clever way around the unfairness issue for this Claimant, but is is wrong in principle and in practice to circumvent proper rules, procedures and filters in JR claims, simply because the Defendant has delayed and may in future again delay making decisions on PB recommendations, or due to delays in granting Legal Aid or due to the pressure of work on the Administrative Court. Furthermore, *Oakley/Sneddon* may or may not decide the proper approach to the issues in this case. Those cases concern a different set of policy criteria from the set in place in July 2022 and different again from the policy criteria in place in January 2024. The new transfer criteria have dropped: (2) that it is essential to transfer to inform the future decisions about release; and (3) that transfer would not undermine public confidence in the system. They retain: (1) that the risk of absconding must be low. They add: (2) that there has been sufficient progress in reducing the risk consistent with protecting the public; and (3) the need for a wholly persuasive case for transfer.

12. Permission for JR is an important filter. The Claimant's suggestion would short circuit that filter for any amended grounds of claim. I do not consider that course would be right or appropriate in a liberty of the subject JR claim. Other ways will have to be found to speed up the process, perhaps as suggested above.

Conclusions

13. For the reasons set out above I consider that this claim should be dismissed, not because it was not a valid claim, but because at the last minute the Defendant made a supervening decision which has made this claim academic.

14. I reject the Claimant's application to stay or adjourn the claim and to allow wholesale amendment after the Defendant publishes the reasons for his new decision, for the reasons set out above. Procedural rigour is useful, fair and important in JR claims.

15. I consider that the costs of the claim should have been the Claimant's because the Defendant should have made its two decision much earlier and in line with his own policy on timescale, but the parties have agreed that the Defendant will pay the

Claimant's costs of the hearing and preparation for the hearing and that otherwise there will be no costs order. I shall abide by that agreement.

Note

I must express my sympathy to the Claimant about how he will feel about this outcome. He has been deprived of his day in Court and it will probably all seem very procedural to him and perhaps it will seem unfair. But he is engaging with, making progress with and working well with the Prison rehabilitation experts, his POM and COM and I encourage him to keep doing so, keep gaining insight and to prove he is reducing his risk.

END